MOTION FILED
MAR 23 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MOTION FOR LEAVE TO FILE AND BRIEF OF FORD MOTOR COMPANY AS AMICUS CURIAE IN SUPPORT OF REMAND

ROBERT E. HERZSTEIN
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae

Of Counsel:

H. R. NOLTE, JR.
Vice President—General Counsel
M. S. EVELEV
Ford Motor Company
Dearborn, Michigan 48121

ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

March, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF FORD MOTOR COMPANY AS AMICUS CURIAE IN SUPPORT OF REMAND

Pursuant to Supreme Court Rule 42(3), Ford Motor Company hereby respectfully moves for leave to file the attached brief as amicus curiae urging that the judgment below be vacated and the case remanded for full consideration of the facts. Counsel for respondent has consented to the filing of this brief. Counsel for petitioner has not consented.

The interest of amicus is as follows:

Ford Motor Company is an international business organization engaged principally in the manufacture, assembly and sale of cars and trucks and related parts and accessories. In the United States, Ford ranks second in the industry in factory sales of cars and of trucks. Ford and its subsidiaries manufacture or assemble in over twenty countries, and Ford products are sold in over 150 countries and territories. Ford also exports cars and trucks and component parts to and from the United States in substantial quantities. Currently, in addition to its trade with Canada in vehicles and parts under the Automotive Free Trade Agreement, it imports certain cars from Europe, light commercial vehicles from Japan, and components and materials from many nations throughout the world.

As the issue in this case has been presented in the courts, the result could be a broad holding that the remission of all indirect taxes constitutes a "bounty or grant," without regard to certain important differences in the tax systems of different nations. Though this case was occasioned by a remission of the Japanese Commodity Tax, the broad ruling discussed by the lower courts and the parties would also implicate the value-added tax systems of various European countries and the federal Manufacturers Sales Tax in Canada. Virtually every export from Europe and Canada to the United States would thus be potentially subject to countervailing duties in the United States.

This development would substantially increase the cost of Ford's imports. In addition, such a broad application of U.S. countervailing duties could bring forth retaliation, uncertainty, and instability in the general flow of trade throughout the world. Such a development

would have an extremely harmful effect on Ford's business, which is heavily dependent upon the ability to import and export products between various countries readily, with clearly defined costs, and on a continuing and predictable basis.

As a company that competes in the U.S. market with imported products, Ford also has an interest in the effective application of countervailing duties when such duties are warranted by incentives granted in the exporting countries. Thus Ford's overall interest is in the careful application of the countervailing duty law to achieve the purpose of that law while avoiding overly broad applications that could have an unnecessary and disruptive impact on U.S. international trade.

Amicus has examined the issues presented in this case from its perspective as a company with strong interests both in an open system of international trade and in fair competition between goods manufactured in the United States and those imported from abroad. Amicus believes that the complexities of national taxation systems and their effect upon the system of international trade are such as to require a careful factual inquiry by the United States before a determination is made whether a tax remission constitutes a "bounty or grant." Only such a careful examination into the economic effects of tax remissions will permit determinations that achieve the statutory objective of fair competition, without unfairly imposing additional duties on a wide range of imports not covered by the statute.

Amicus is particularly concerned that no such examination was made in this case, and that the briefs previously filed by both parties have presented the issue in broad terms, without reference to the particular facts of

the Japanese Commodity Tax Law, and as though all foreign indirect taxation systems operate in the same way and have the same effect on imports into the United States. Amicus presents reasons and authorities indicating that different foreign indirect tax remission systems may have different impacts on exports to the United States. Amicus urges a remand or certain alternative dispositions of this case—all different from those thus far urged by either party—which would call for examination of the operation and effect of a foreign tax system before countervailing duty determinations are made. Accordingly, Amicus requests that this Court grant leave to file the attached brief.

Respectfully submitted,

ROBERT E. HERZSTEIN
Attorney for Amicus Curiae

Of Counsel

H.R. NOLTE, JR.
M.S. EVELEV

ARNOLD & PORTER

TABLE OF CONTENTS

PAGE

Statute Involved 1
Questions Presented 2
Statement 3
Summary of Argument 6
ARGUMENT
I. The Court Should Remand This Case For Consideration of Whether the Rebate of Japanese Commodity Taxes Provides an Incentive For the Export of Japanese Products to the United States 9
A. Neither the Treasury Nor the Courts Below Evidenced Any Consideration of the Actual Effects of the Japanese Rebates of Commodity Taxes 13
1. The Department of the Treasury.. 13
2. The United States Customs Court 14
3. The United States Court of Customs and Patent Appeals 15
B. The Principle For Determining Whether a Tax Rebate Constitutes a "Bounty or Grant" Should be Whether That Rebate Encourages Exports 15
1. The Starting Point For Analysis is the Recognition That a Remission of Taxes on Exports Might Operate as an Incentive to Exports 16
2. When an Indirect Tax Covers All or Most of a Country's Products, Adjustments to Exchange Rates and Wage Rates Will Negate the Advantage That Might Accrue to Export Sales..... 18
3. When an Indirect Tax Is Selective, the Rebate Upon Export Does Promote Exports 21

PAGE

C. Inquiry Into the Operation and Effect of Foreign Tax Remissions is Entirely Feasible and is Consistent With This Court's Prior Decisions Under The Act 23

II. If This Court Enters Judgment For Zenith, It Should Do So on the Basis of the Facts Peculiar to the Japanese Tax Involved in This Case 26

A. The Japanese Commodity Tax Law is a Selective Indirect Tax That Confers a Competitive Advantage on Exports 27

B. A Narrow Holding is Necessary if the Purpose of the Countervailing Duty Statute is to be Respected 28

C. A Narrow Holding is Further Compelled by the Unique Circumstances of Long-Standing Reliance on Established Administrative Practice 29

III. If This Court Affirms the Decision of the Court of Customs and Patent Appeals, Its Decision Should Not Preclude Later Determinations That Rebates of Specific Indirect Taxes Are Bounties or Grants 30

CONCLUSION 32

APPENDIX A 1a

TABLE OF AUTHORITIES

CASES: PAGE

American Express Co. v. *United States*, 472 F.2d 1050 (C.C.P.A. 1973) 10

Apex Hosiery v. *Leader*, 310 U.S. 489 (1940) 12

Downs v. *United States*, 187 U.S. 496 (1903) 8,17,20 24,25

Fortner Enterprises, Inc. v. *United States Steel Corp.*, 394 U.S. 495 (1969) 13

Nicholas & Co. v. *United States*, 249 U.S. 34 (1919) 8,25

Norfolk Monument Co., Inc. v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969) 13

Poller v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) 13

United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948) 12

Walter Holm & Company v. *Hardin*, 145 U.S. App. D.C. 347, 449 F.2d 1009 (1971) 16

ADMINISTRATIVE DECISIONS

Electrical Transmission Towers from Italy, T.D. 67-102 10

Leather Handbags from Uruguay, T.D. 78-33 10

X-Radial Steel Belted Tires from Canada, T.D. 73-10 11

STATUTES

Sherman Act, 15 U.S.C. §§ 1 et seq. 12,13

Trade Act of 1974, P.L. 93-618 3,14

19 U.S.C. § 1303 1,3

19 U.S.C. § 1516 4

PAGE

MISCELLANEOUS

P. Areeda, Antitrust Analysis (2d ed. 1973)..... 12

R. Baldwin, Nontariff Distortions of International Trade (1970) 20,22

Business International Corp., Investing, Licensing and Trading Conditions Abroad —France (1977) 19

Council on Wage and Price Stability, Report to the President on Prices and Costs in the United States Steel Industry (1977)..... 20,22

K. Dam, The GATT—Law and International Economic Development (1970) 18

Executive Branch GATT Studies, No. 1, "Tax Adjustments in International Trade: GATT Provisions and EEC Practices," U.S. Sen. Comm. on Finance, 93d Cong., 2d Sess. (Compilation of 1973 Studies Prepared by the Executive Branch: Comm. Print 1974).... 17

Federal Trade Commission, Staff Report on the U.S. Steel Industry and its International Rivals (1977) 20

T. Hayashi, Guide to Japanese Taxes (1977)... 22

J. Jackson, Legal Problems of International Economic Relations (1977)..... 10

Marks & Malmgren, Negotiating Nontariff Distortions to Trade, 7 Law & Pol. Int'l Bus. 327 (1975)..... 10,18,25

J. Meade, The Balance of Payments (1951)..... 20

Organisation for Economic Cooperation and Development, Border Tax Adjustments and Tax Structures in OECD Member Countries (1968)..... 19,25,30

PAGE

Organisation for Economic Cooperation and Development, Revenue Statistics of OECD Member Countries, 1965-1975 (1977) 25

Rosendahl, Border Tax Adjustments: Problems and Proposals, 2 Law & Pol. Int'l Bus. 85 (1970)..... 18

U.S. Dept. of Commerce, United States Trade with Major Trading Partners, 1969-75 (1976)..... 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF OF FORD MOTOR COMPANY AS AMICUS CURIAE IN SUPPORT OF REMAND

Statute Involved

Section 303(a)(1) of the Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. 1303(a)(1) (Supp. V 1975) provides:

> "Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel,

or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed."

Questions Presented

1. Whether the Department of Treasury should be required to conduct a factual examination and make reasoned findings concerning the operation and effect of tax remissions under a foreign tax law before determining that such remissions do, or do not, constitute a "bounty or grant" subject to countervailing duties in the United States?

2. Whether any decision affirming or reversing the judgment of the court below should carefully distinguish the selective Japanese Commodity Tax there involved from general and nonselective taxes such as the European value-added tax and the Canadian federal Manufacturers Sales Tax?

Statement

The first general Countervailing Duty Statute was enacted in 1897.[1] Its purpose was to offset the competitive advantage that foreign products would have in the U.S. market when they are exported from a foreign country with the benefit of a subsidy. The statute seeks this objective by directing the Secretary of the Treasury to levy a countervailing duty on imported products equal to the "bounty or grant" bestowed on the goods abroad.

For many years the Department of the Treasury has refused to impose countervailing duties on products which, on export from their country of origin, had benefited from the rebate[2] of sales or excise taxes, because the Secretary did not consider the rebate of these "indirect" taxes to be a "bounty or grant" under the Countervailing Duty Statute.[3] Because of statutory technicalities peculiar to customs law, however, a determination by the Treasury not to impose countervailing duties could not be challenged in court. Thus domestic producers who complained about competing imports which benefited from foreign rebates of "indirect" taxes were unable to obtain judicial review of the Department's denial of their petitions for relief. In the Trade Act of 1974, Congress provided for judicial review of the Secretary's negative

[1] 30 STAT. 205. The statute has been reenacted in substantially unchanged form several times. At present it is Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (Supp. V. 1975).

[2] "Rebate" as used herein indicates any remission, exemption, or forgiveness of any tax that would have been collected but for export of the product.

[3] The Government stated that the first announcement of this practice by the Treasury was in 1898, less than a year after passage of the statute. Brief of the United States in Opposition to Petition for Certiorari 5.

countervailing duty determinations.[4] This case presents the first major instance of judicial review of a Treasury determination that a foreign nation's rebate of "indirect" taxes does not constitute a "bounty or grant" within the meaning of the law. The results of the case can have a major impact on the international trading system.

The parties and the courts below have treated this case as an abstract question of law. Opposite extremes have been urged by the two parties and adopted by the two lower courts. Petitioner Zenith has relied upon decisions 60 and 70 years old in arguing that the forgiveness of "indirect" taxes upon exportation to the United States constitutes the bestowal of a bounty or grant.[5] The United States Customs Court accepted this argument and concluded in broad terms that "the Japanese Commodity Tax involves the remission of an indirect tax and, as such, is countervailable under section 1303." *Zenith Radio Corporation* v. *United States,* C.D. 4691, 430 F. Supp. 242 (1977). On the other hand, respondent the United States has argued that *no* remission of, or exemption from, an indirect tax constitutes a bounty or grant under the Countervailing Duty Statute unless the remission exceeds the original tax imposed.[6] The United States Court of Customs and Patent Appeals, in turn, affirmed this position. *United States* v. *Zenith Radio Corporation,* C.A.D. 1195, 562 F.2d 1209 (1977).

In essence, each party to the controversy has urged a *"per se"* rule; at no stage of these proceedings have there

[4] P.L. 93-618 § 331(b), (c), 88 STAT. 2052, *revising* Section 516 of the Tariff Act of 1930 (19 U.S.C. 1516 (Supp. V 1975)).

[5] *See* Zenith's Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals 3-4.

[6] Brief for United States in the United States Court of Customs and Patent Appeals 7. Brief for United States in Opposition to Petition for Certiorari 8, 11-12.

been developed facts pertaining either to the operation and effect of "indirect" taxes in general, or to the Japanese Commodity Tax Law in particular.

The polar positions of the parties and the absence of a developed factual record place this Court in the position of choosing between two unsatisfactory resolutions of the case. First, this Court might approve the decision of the Department of the Treasury despite the absence of findings of fact and a reasoned analysis relating such findings to the governing statute. Such a course would have the effect of precluding the application of the statute to any remission of indirect taxes, and would frustrate the evident purpose of the Countervailing Duty Statute. Alternatively, this Court could approve the position urged by Zenith and adopted by the Customs Court—also in the absence of findings of fact and reasoned analysis relating the findings to the statute. That course would upset a long-established administrative practice, which has inevitably engendered widespread reliance by both businesses and governments in the world's major trading nations.

Amicus believes the broad rule urged by Zenith would have a highly disruptive impact on international trade. It would also be harmful to the economic and political position of the United States, as well as to companies such as Amicus which depend on the orderly and open flow of international trade. Thus Amicus opposes reversal and reinstatement of the judgment of the Customs Court, as urged by Zenith. On the other hand, it does not appear necessary, as urged by the respondent, to preclude the operation of the Countervailing Duty Statute to any and all remissions of foreign indirect taxes, without factual inquiry into their operation and effect. Such a ruling would be inconsistent with both the language and

the purpose of the Statute. Thus Amicus also opposes affirmance of the Court of Customs and Patent Appeals, as proposed by respondent.

Amicus urges instead that the case be remanded so that the Department of the Treasury may examine the operation and effect of the Japanese Commodity Tax Law and make a fresh determination whether tax remissions under that law constitute a "bounty or grant." In particular, it is the position of Amicus that the Treasury Department should distinguish between rebates of selective indirect taxes, imposed on only a few products in the exporting country, and rebates of general indirect taxes imposed evenly on virtually all products. If the case is not remanded, Amicus urges that the Court refrain from adopting either of the polar positions of the parties, and make clear that future determinations under the Countervailing Duty Law must be made after an examination of the economic effects of the specific indirect tax remission then in question.

Summary of Argument

Section 303 of the Tariff Act of 1930 requires the Department of the Treasury to impose a countervailing duty on imports into the United States which benefit from a "bounty or grant" from the exporting country. However, that statute does not define the term "bounty or grant." The phrase must be interpreted by referring to the purpose of the statute, which is to offset foreign practices that ~~and~~ provide an incentive to export products to the United States rather than sell them in the home market.

Throughout this litigation, the parties and the courts below have framed the issues in all-inclusive terms—disputing whether the remission upon export of an indirect

tax does, or does not, constitute a "bounty or grant." Each party has argued, in effect, for a *per se* rule which, would either make all such remissions a "bounty or grant," or none of them. But in order to determine whether a foreign practice falls within the category of evils which Congress sought to remedy, it is necessary to examine the operation and economic effects of the practice in question. In this case, there is no evidence that the Department of the Treasury, Zenith, or the courts below have studied the operation and effect of the Japanese Commodity Tax Law. The Treasury Department simply issued a conclusory determination that "no bounty or grant is being paid" on the products in question. The Customs Court granted summary judgment for Zenith on the basis of no facts other than a two-sentence description of the Japanese Commodity Tax Law. The Court of Customs and Patent Appeals reversed and entered summary judgment for the United States on the ground that the Secretary of the Treasury has "presumably" made a determination concerning the economic results of the Japanese tax remission.

This Court should remand the case for a careful consideration of how the Japanese Commodity Tax Law affects the export of products to the United States. The Department of the Treasury and the courts below can then carry out their responsibilities under the statute by determining whether rebates of the Japanese Commodity Tax provide an economic incentive to export goods rather than sell them in Japan, and thereby distort trade.

Amicus urges, in short, that decisions in this and other countervailing duty cases take account of the peculiarities and differing effects of the indirect tax systems of various countries. One important difference is that the Japanese Commodity Tax applies only to selected products, where-

as the indirect taxes levied by many other countries (including the European Community and Canada) are of general application. This distinction is important because rebates of general indirect taxes are offset by changes in the exchange rate and wage rates in the taxing country. Thus remission of a general indirect tax tends not to provide an incentive to export. On the other hand, a selective indirect tax, such as that of Japan, creates a continuing incentive to export items on which the tax is rebated, and thus distorts normal trading patterns.

The careful examination of the Japanese tax which Amicus urges would not be inconsistent with this Court's prior decisions under the Countervailing Duty Statute. Indeed, the *Downs* and *Nicholas* decisions of this Court, which have occasioned so much discussion throughout these proceedings, represent cases in which the Court carefully considered the facts of individual tax rebates on individual commodities. Moreover, the Department of the Treasury is capable of undertaking such an analysis, which is similar in scope to those which it performs in other contexts.

If this Court declines to remand the case and instead reaches a decision on the merits, the Court should refrain from adopting either of the prior positions of the parties. If the Court decides that the rebate is a bounty or grant, it should limit the scope of its ruling to selective taxes like the Japanese Commodity Tax, and should avoid implicating indirect taxes of other nations which are of general applicability. As indicated previously, a selective tax provides an incentive to export; a general one is offset by other economic adjustments and provides no enduring incentive. In addition, the selective indirect tax used in Japan is but a minor part of its entire tax structure, whereas many European nations have instituted indirect

taxes that provide sizable portions of total governmental revenues, at a time when the Treasury did not consider indirect tax remission to be a "bounty or grant". Thus, a broad holding that all rebates of indirect taxes constitute a "bounty or grant" is not only unnecessary, but it would also have profound implications for the international trade and domestic tax structures of many European nations and Canada.

Finally, if this Court decides that the Japanese Commodity Tax Law does not constitute a bounty or grant, it should do so in a manner that does not preclude later determinations by the Treasury Department, based on an examination of economic effects, that certain rebates of indirect taxes *are* countervailable under Section 303.

ARGUMENT

I. The Court Should Remand This Case For Consideration Of Whether The Rebate Of Japanese Commodity Taxes Provides An Incentive For The Export Of Japanese Products To The United States.

Section 303 of the Tariff Act of 1930, as amended, which authorizes the imposition of countervailing duties by the Secretary of the Treasury, is framed in very broad terms: these duties are to be levied whenever any "bounty or grant" is paid upon the manufacture, production or export of any article. The statute contains no definition of "bounty or grant." The meaning and boundaries of this phrase must be sought by looking to the purpose of the statute.

The purpose is to offset, by means of an additional import duty, foreign payments or benefits which provide an incentive to export products to the U.S. marketplace

and which are therefore likely to distort the flow of trade according to principles of comparative advantage. By this method the statute seeks to preserve fair competition in the United States between foreign exports and products manufactured in the United States.[7]

Foreign benefits which can provide an incentive to export rather than sell in the home market can, quite obviously, take a wide variety of forms. The foreign government can make outright cash payments to its manufacturers based on quantities exported; it can relieve the exporter of taxes or other burdens that would otherwise be imposed;[8] or it can supply services, financing, or other governmental benefits in a fashion which is keyed to export activities.[9] However, governmental benefits to a company or industry which are both of general assistance and do not have the effect of providing an inducement for

[7] For a brief description of the scope and operation of the Countervailing Duty Statute, see J. Jackson, Legal Problems of International Economic Relations §§ 12.3(A), 12.3(C) (1977); Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 Law & Pol. Int'l Bus. 327, 343-67 (1975). By our summary description of the purpose of the Statute, we do not mean to set forth the definitive test to be applied in making determinations under the Act following proper examination of the effects of a specific indirect tax remission scheme. That test is not in controversy at this time, the only question here being whether such remissions are always, or never, covered by the Statute. We refer to the test hereafter in shorthand fashion as "creating an incentive to export," though as the discussion indicates the test might have to be more complex in some situations to distinguish between benefits that do and do not involve the evils at which Congress aimed in enacting the Statute.

[8] *See, e.g.*, Electrical Transmission Towers from Italy, T.D. 67-102, *aff'd*, American Express Co. v. United States, 472 F.2d 1050 (C.C.P.A. 1973). Upon the exportation of transmission towers, the government of Italy rebated internal charges and taxes such as stamp, transportation, insurance and mortgage taxes.

[9] *See, e.g.*, Leather Handbags from Uruguay, T.D. 78-33 (preferential financing for exports).

exports must be set to one side, because it does not appear that they fall within the purpose of the statute. Subsidies for general manufacturing activity, tax remissions based on plant location or employment conditions, general government financial assistance to an industry, and similar benefits may be neutral in their effect on exports as compared with sales in the home market, or may benefit exports disproportionately, depending on a variety of circumstances.[10]

Whether a given governmental benefit creates an inducement for exports can also depend on the conditions prevailing in international trade. In some circumstances, as will be illustrated below, the effect on exports of a benefit granted by one government may be neutralized by economic adjustments that take place in the international trading system.

Because of the complex and changing nature of the practices which the Countervailing Duty Statute regulates, it is not realistic to seek a precise and enduring definition of the phrase "bounty or grant" which will permit facile determinations in cases involving novel facts. Some government benefits which appear neutral on their face

[10] In X-Radial Steel Belted Tires from Canada, T.D. 73-10, 38 Fed. Reg. 1018 (January 8, 1973), for example, the Department of the Treasury imposed countervailing duties against imports of tires produced in plants to which the Government of Canada and the Province of Nova Scotia had allowed accelerated depreciation, low-interest loans, and certain property tax concessions. Although these programs seemed to benefit equally products destined for domestic and foreign consumption, the Treasury Department determined that, because of the size of the specific manufacturing facilities there involved and the relative size of the home market, a "substantial majority" of the tires produced were intended for export to the U.S. Thus, based on a factual examination of the operation and effects of the specific program in question, the apparently neutral benefits were considered to be bounties upon export.

may in fact create an inducement for exports; others which appear to create such an inducement may in fact not do so when examined in practice. The 1897 statute is one which must be interpreted as a broad statement of purpose designed to cover a variety of fact situations which are too complex for a legislature to cope with individually, and which will inevitably evolve with changing economic conditions. Like the Sherman Act, it can only be implemented by examining the operation and economic effects of actions in individual cases.[11]

Because of the complexities of international trade, determinations under Section 303 require examination of several factors: the manner in which the foreign practice alleged to be a "bounty or grant" actually operates; the economic effects of this practice; and the extent to which the practice is offset by "adjustment mechanisms" in the economy such as floating exchange rates.

[11] *See, e.g.*, these Sherman Act cases: United States v. Columbia Steel Co., 334 U.S. 495, 526 (1948) ("The very broadness of terms such as restraint of trade, substantial competition and purpose to monopolize have placed upon courts the responsibility to apply the Sherman Act so as to avoid the evils at which Congress aimed"); Apex Hosiery v. Leader, 310 U.S. 469, 489 (1940) ("The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed.") *Cf.* P. Areeda, Antitrust Analysis 46 (2d ed. 1973): "Thus, the Sherman Act may be seen not as a prohibition of any specific conduct but as a general authority to do what common law courts usually do: to use certain customary techniques of judicial reasoning, to consider the reasoning and results of other common law courts, and to develop, refine, and innovate in the dynamic common law tradition."

A. *Neither the Treasury nor the Courts Below Evidenced Any Consideration of the Actual Effects of the Japanese Rebates of Commodity Taxes.*

In the context of suits instituted under the Sherman Act, this Court has expressed its disapproval of the use of summary judgment in cases presenting complicated economic issues.[12] Despite the need for an economic analysis to determine whether the Japanese Commodity Tax Law provides an incentive to export, the Department of the Treasury simply issued a conclusory determination, and both lower courts granted motions for summary judgment.

1. **The Department of the Treasury.** In considering petitioner Zenith's allegation that the Government of Japan was, directly or indirectly, paying or bestowing grants or bounties upon the manufacture, production or exportation of certain consumer electronic products, the Office of the Secretary of the Treasury issued a Notice of Preliminary Determination,[13] an amendment to this Notice of Preliminary Determination,[14] and a Final Negative Countervailing Duty Determination.[15] These notices did not mention the Japanese Commodity Tax and forgiveness therefrom for exports, nor do they explain why this forgiveness does not constitute a "bounty or grant." The Final Negative Countervailing Duty Determination merely concluded in general terms that "no bounty or grant is being paid or bestowed, directly or indirectly . . . upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan."[16]

[12] *See, e.g.*, Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962).

[13] 40 Fed. Reg. 5378 (February 5, 1975).

[14] 40 Fed. Reg. 19853 (May 7, 1975).

[15] 41 Fed. Reg. 1298 (January 7, 1976).

[16] 41 Fed. Reg. at 1298.

In describing the Secretary's determination, the Court of Customs and Patent Appeals acknowledged that "the record is silent regarding the economic result of the mere remission of the Japanese Commodity Tax." 562 F.2d at 1216. The court nonetheless stated that the "Secretary has *presumably* determined that the economic result here is not the conferring of such a benefit, subsidy, or incentive as would rise to the level of a bounty or grant under § 303." *Id.* (emphasis added). Such a presumption is no substitute for a statement of reasons for the determination from the Secretary.[17] Absent such a statement, the judiciary will be unable to evaluate the reasonableness of the Secretary's exercise of administrative discretion.[18]

2. **The United States Customs Court.** Despite the silence of the Department of the Treasury on this issue, the United States Customs Court granted Zenith's motion for summary judgment. In so doing, the Customs Court noted that the "essential facts of the controversy are not in dispute." 430 F. Supp. at 242. Yet the only facts recited by the court were those recounting the proceedings in the case and a two-sentence description of the Japanese

[17] In Section 331(b) and 331(c) of the Trade Act of 1974, Congress provided for the judicial review of the Secretary's decision not to impose countervailing duties. If this provision for review is to have any meaning, the judiciary must have a *basis* upon which it can assess the reasonableness of the Secretary's decisions.

[18] The dissent in the Court of Customs and Patent Appeals emphasized that "there was no determination of economic result by the Secretary with respect to the Japanese Commodity Tax—not even a *de minimis* determination." 562 F.2d at 1223, 1225 (Miller, J., dissenting). The dissent also suggested remand "if the majority remains convinced that the economic result of the remission of the Japanese Commodity Tax is decisive of the issue before us." 562 F.2d at 1225, n.6.

Commodity Tax Law. Needless to say, the court did not consider the actual operation and effects of the tax and the rebates.[19]

3. **The United States Court of Customs and Patent Appeals.** In reversing the Customs Court and ordering entry of summary judgment for the United States, the Court of Customs and Patent Appeals also failed to analyze the details of the Japanese scheme. In addition to its unsupported "presumption" that the Secretary had determined the economic effect of the rebate at the border, the majority framed the issue before it in overly broad terms, declaring that the "dispositive issue is whether the mere remission of an excise tax must, as a matter of law, be deemed a bounty or grant under [the statute]." 562 F.2d at 1212 (fn. omitted). The actual issue facing the court was whether remission of the *Japanese commodity tax* must be deemed a bounty or grant, not whether remission of *any* indirect tax must be so considered as a matter of law.

B. *The Principle for Determining whether a Tax Rebate Constitutes a "Bounty or Grant" Should Be Whether That Rebate Encourages Exports.*

In remanding for further consideration of whether the Japanese Commodity Tax Law is a bounty or grant, this Court should instruct the Treasury and the lower courts to examine whether the scheme actually encourages exports of products on which the tax rebates are granted, in

[19] Newman, J., concurring, addressed this issue briefly, but felt that no triable issue existed, because, as a matter of law, "when exports are relieved of a domestic consumption tax burden which would otherwise be imposed if the goods were sold in the home market, a bounty or grant, as these terms were construed in *Downs* and *Nicholas*, is bestowed on the exporter." 430 F. Supp. at 249, 258.

preference to sale of such products in the home market.[20] Thus, their determination will not rest on a distinction between rebates of direct and indirect taxes, but on the effects of the particular rebate program. In making this determination, the Treasury and the lower courts should consider the basic difference in economic effect between selective indirect taxes on the one hand and general and uniform indirect taxes on the other, as described below.

This inquiry into the effects of any particular tax and rebate program would not dramatically increase the burden of enforcing the statute, because the inquiry need not be made *ab initio* in every case. Once a particular tax program has been the subject of an investigation under the Countervailing Duty Statute, the facts and analysis developed therein can be utilized in subsequent cases involving the same program. At a minimum, though, all tax and rebate programs which have significantly different features or effects from those previously examined should be the objects of separate study.[21]

1. The Starting Point for Analysis Is the Recognition That a Remission of Taxes on Exports Might Operate As an Incentive to Exports.

In view of the broad language of Section 303, it is reasonable to assume, as a starting point for an analysis of whether a foreign tax rebate constitutes a bounty or grant, that the remission of any taxes upon export of a product has the potential of operating as an incentive to exports.

[20] See note 11, *supra*, and accompanying text.

[21] *Cf. Walter Holm & Company* v. *Hardin*, 145 U.S. App. D.C. 347, 353, 449 F.2d 1009, 1015, where the court stated: "The kind of procedure required must take into account the kind of questions involved."

This assumption was expressed by the *Downs* Court[22] and has been urged by Zenith throughout these proceedings.

The assumption is based on the following, somewhat simplified reasoning. When an indirect tax such as that here under consideration is imposed on consumer products produced in a country, but the tax is rebated at the border for those products which are exported, the following consequences would initially be expected in many cases: (i) the price to domestic consumers of the selected items is raised, thereby reducing sales; (ii) the producer can recapture these sales only by reducing its prices to domestic customers, with the result that the producer bears part of the tax; and (iii) the producer can therefore make more money on an export sale, which is free of tax, than on a domestic sale, so there is then an incentive for the producer to shift his selling emphasis to exports.[23]

[22] *Downs* v. *United States*, 187 U.S. 496, 515 (1903).

[23] In evaluating whether a tax rebate upon export constitutes a bounty or grant, the Treasury Department has long distinguished between rebates of direct taxes and rebates of indirect taxes. The latter, which are imposed on the product itself, are considered by the Treasury not to be bounties or grants. On the other hand, rebates of direct taxes—those imposed on the manufacturer, such as income taxes and payroll taxes—are considered to be a bounty or grant.

This distinction is based on the highly questionable assumption that different economic consequences necessarily attach to rebates of direct and indirect taxes. Respondent has offered the traditional justification for the distinction that indirect taxes are fully "passed on" to the consumer and that, accordingly, their rebate upon export does not provide an incentive for the manufacturer to export, rather than sell domestically. Brief of the United States in Opposition to Petition for Certiorari 6-7. However, there is general agreement among contemporary economists that indirect taxes are not always fully shifted forward. Nor are direct taxes fully borne by the manufacturer. Demand for the product, monetary and competitive conditions, and the position of the manufacturer inevitably affect the "shifting" of both direct and indirect taxes. *See* Executive Branch GATT Studies, No. 1, "Tax Adjustments in International Trade: GATT Provisions and EEC Practices," at 7, Sen. Comm. on Finance, 93d Cong., 2d

2. When an Indirect Tax Covers All or Most of a Country's Products, Adjustments To Exchange Rates and Wage Rates Will Negate the Advantage That Might Accrue to Export Sales.

The statutory assumption just described is not the end of the inquiry, but is only a first step in the analysis. There are different schemes of indirect taxation, with varying consequences for production and trade. At one extreme is

Sess. (Compilation of 1973 Studies Prepared by the Executive Branch: Comm. Print 1974); K. Dam, The GATT—Law and International Economic Development 214-16 (1970); Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 Law & Pol. Int'l Bus. 327, 351 (1975); Rosendahl, *Border Tax Adjustments: Problems and Proposals*, 2 Law & Pol. Int'l Bus. 85, 107, 109-11, 120 (1970).

Officials of the Treasury Department have themselves admitted that the direct/indirect distinction is not always justified. *See, e.g.*, remarks of former Assistant Secretary of the Treasury Petty in a paper for the Twenty-first Annual Conference of the Canadian Tax Foundation, November 20, 1968: "Modern economic theory suggests that the distinction implicit in the GATT treatment of direct and indirect taxes is an extreme and arbitrary assumption which does not stand the test of economic reality."

In its briefs the United States has also argued that a countervailing duty on products benefiting from rebate of indirect taxes would lead to double taxation "that would result from the imposition of similar taxes by the importing country." Brief of the United States in Opposition to Petition for Writ of Certiorari at 6. However, it seems an artificial posture to presume that export remission of one country's particular kind of tax will always, or even normally, be offset by equivalent taxes in the importing country, or that a double tax will occur if export remissions are not made. In limited situations such as liquor taxes, where there is a fairly uniform practice of taxation on the "destination principle" (*i.e.*, the excise tax is not paid on export, but is applied by the nation where the product is sold for consumption), the Treasury Department might conclude after examination of the facts that no trade distortion is caused by the foreign tax remission since the U.S. excise tax on liquor has an effect comparable to a countervailing duty. It might then conclude, on such specific facts, that no "bounty or grant" is present. But such a conclusion must be based on actual facts and not on an unrealistic presumption that all foreign indirect tax remissions will be offset by U.S. sales taxes.

a uniform indirect tax applicable to all or most products sold in a country, such as the West German value-added tax and the Canadian excise tax.[24] At the other extreme is an indirect tax applied only to a relatively small group of products, either at a uniform or variable rate. The Japanese Commodity Tax is an example of such a selective indirect tax scheme, inasmuch as it applies to a limited range of products.[25] Between the extremes are schemes that impose an indirect tax on all or nearly all products, but at varying rates for different groups of products, with a few groups at the high end of the tax spectrum. The French value-added tax is of this kind.[26]

Modern economic analysis indicates that the rebate at the time of export of a uniform, general indirect tax does not cause permanent distortions to international trade, so long as currency values are free to change. The imposition of such a uniform and general tax affects all prices and production incentives throughout an economy. The balance of payments of the country is thereby affected, as the tax reduces domestic purchases and imports, and increases exports. However, all these effects on the nation's economy are generally offset by corresponding increases in the value of the country's currency and increases in domestic

[24] The West German VAT is applied at 11% to nearly all goods; a reduced rate of 5½% is applied to foodstuffs and agricultural products. Organisation for Economic Cooperation and Development, Border Tax Adjustments and Tax Structures in OECD Member Countries 128-31 (1968). The Manufacturers Sales Tax of the Canadian federal government is a general, single-stage tax of 12% that applies to most goods. *Id.* at 116-118.

[25] *See* Appendix A and discussion in II.A., *infra*.

[26] The French VAT is applied to most goods at the rate of 17.6%. A reduced rate of 7% applies to certain foods, agriculture products, fish and books. A 33.3% rate applies to new passenger cars, motorcycles, photographic equipment, radios, tape recorders and furs. Business International Corp., Investing, Licensing & Trading Conditions Abroad—*France* at 20 (1977).

wage levels. After these exchange and wage rate changes, the allocation of resources and composition of the country's domestic and export trade are largely restored to the conditions that prevailed before imposition of the tax. Thus, no enduring incentive to export has been provided.[27] In these circumstances, the problem which Congress sought to remedy in Section 303 is not present. Systems of general indirect tax and border adjustment do not operate as bounties or grants upon the manufacture or export of articles so long as an international system of floating exchange rates allows such tax systems to be offset by adjustments in currency values.[28]

---

[27] It is well established among economists that the imposition of a uniform ad valorem export subsidy and a corresponding import duty is the equivalent of a currency devaluation of the same percentage: it can be perfectly offset by a corresponding revaluation, or a combination of revaluation and an increase in the general level of wages and prices. *See* J. E. Meade, The Balance of Payments, 263-64 (1951). Thus a uniform export rebate which acts as an export subsidy and an import duty can be and normally is offset by corresponding exchange rate or wage-price adjustments leaving resource allocation and production incentives the same as before the imposition of the rebate. Therefore, under a system of flexible exchange rates, a uniform and general rebate does not create a general incentive to export and thus does not cause substantial or permanent distortion of trade. *See* Council on Wage and Price Stability, Report to the President on Prices and Costs in the United States Steel Industry 91-92 (1977); R. Baldwin, Nontariff Distortions of International Trade 179-80 (1970); Federal Trade Commission, Staff Report on the U.S. Steel Industry and its International Rivals 314-15 (1977).

[28] General indirect taxes such as the high-rate value-added taxes of Europe were unknown at the time when *Downs* was decided and when Treasury struck upon its distinction between direct and indirect taxes. The relatively recent proliferation of value-added taxes is an example of the dynamism of national practices which requires careful consideration by the Treasury Department of the trade effects of each country's indirect tax system before countervailing duty determinations are made.

3. When an Indirect Tax Is Selective, the Rebate Upon Export Does Promote Exports.

When an indirect tax is levied only on selected items and is rebated upon export of these items, the initial assumption that remission subsidizes exports holds true. In these circumstances, like those prevailing under a general indirect tax, exchange and wage rates are affected. However, because only a relatively small portion of the gross national product and balance of trade of the country are affected by a selective tax, changes in the country's overall exchange rate and wage rates will be minimal. They will not be sufficient to offset the export-incentive effect of the tax remission on specific products. For example, a 15 or 20 percent excise tax on automobiles, remitted at the border, would create a substantial export incentive. If this tax were not generally imposed on other products in the economy, the exchange rate and wage rate adjustments would be quite small and would not offset the 15 or 20 percent incentive on automobiles. The diversion of sales of the taxed product from domestic to export markets mentioned in I.B.1. above would become permanent.

This permanent effect is described in a recent report of the Council on Wage and Price Stability as follows:

> "There are two varieties of export incentives: general and selective. General measures have across-the-board effects on production costs in all exporting industries, while selective measures apply only to targeted industries. General measures are unlikely to alter significantly the commodity composition of a nation's exports. . . .

> Nor would they exert a significant long-term effect on the trade balance since exchange rates would shift in a compensatory fashion. Selective measures are designed to accomplish such mix changes by causing shifts in relative prices and production levels within the various exporting industries. . . if the VAT [value-added tax] on steel is not different than the VATs on other European exports, it is unlikely that VAT rebates to steel exports significantly improve the competitiveness of the European steel industry. On the other hand, if the VAT [on steel] is substantially higher than the average rate of value-added taxation, the rebate should improve the competitiveness of European steel." [29]

Thus, in the words of one economist, a selective tax scheme, with rebates on exports, is "equivalent to imposing a tax on domestic output and simultaneously introducing an export subsidy." [30]

The Japanese commodity tax applies to products that represented less than eight percent of total domestic consumption in fiscal year 1976. The tax is levied at rates of between 5 percent and 30 percent for varying groups of products. The average rate appears to be about 15 percent.[31]

A fifteen percent tax, for example, on only eight percent of domestic consumption, with rebate on exports,

[29] Council on Wage and Price Stability, note 27 *supra* at 91-92.

[30] R. Baldwin, Nontariff Distortions of International Trade 101 (1970).

[31] *See generally* T. Hayashi, Guide to Japanese Taxes, 27-30 (1977). The eight percent figure was calculated from statistics released by the Japanese National Tax Administration and in the OECD Quarterly National Accounts Bulletin 1977/IV.

obviously would have only limited effects on the exchange rate of the yen. It would therefore only minimally offset the incentive to export created by the rebate. The incentive to export remains.[32] We believe it likely that investigation of these facts on remand would lead to a conclusion that the Japanese tax remission constitutes a "bounty or grant."

C. *Inquiry Into the Operation and Effect of Foreign Tax Remissions is Entirely Feasible and is Consistent with this Court's Prior Decisions Under the Act.*

Upon remand, the Treasury and the lower courts should be instructed to discard the erroneous "bright-line" distinction between direct and indirect taxes, in favor of an examination of actual economic effects. Contemporary economic analysis demonstrates that if a line is to be drawn in order to facilitate administration of Section 303 as it affects border rebates of taxes, that line should distinguish between selective and general indirect taxes.

It is important to note that disregarding the present direct/indirect distinction would call on the Treasury Department only to make analyses that are clearly within the scope of its demonstrated capacity. Inquiries of the type proposed here are no more complex or difficult than

[32] The same conclusions would also follow in a case such as the French system involving a general tax on all items where selected items are taxed at higher than average rates. The adjustment mechanisms described in the preceding section, concerning general and uniform tax systems, would offset the effect of the *average* tax, but those who produce products which are taxed at a higher than average rate would still have an incentive to export them since the tax remission on export exceeds the amount of the general economic adjustments.

the type of study the Department now performs in evaluating the export incentive resulting from rebates of direct taxes.[33]

Nor is there anything in this Court's prior decisions under the Act which is inconsistent with the careful enforcement approach we suggest. Zenith has relied heavily on *Downs* v. *United States,* 187 U.S. 496 (1903), which, it claims, held in broad terms that "the forgiveness of taxes . . . upon exportation to the United States, constitutes the bestowal of a bounty or grant."[34] The Customs Court similarly rested on *Downs* in granting Zenith's motion for summary judgment. 430 F. Supp. at 244. Zenith and the Customs Court also placed much weight on what they perceived to be Congressional ratification of the *Downs* "holding" by reenactment of the countervailing duty statute in subsequent years.[35] The Government and the Court of Customs and Patent Appeals, on the other hand, find support in *Downs* for their position that only "excessive" rebates of individual taxes constitute bounties or grants.[36]

Laying aside the formidable problems encountered in interpreting *Downs* and in determining whether Congress intended to ratify the *Downs* "holding" as Zenith characterizes it, the fact remains that the character and significance of indirect taxes and their rebate upon exportation

[33] Another example of the Department's capacity for complex analysis is a recently proposed antidumping regulation that would require rather complex adjustments to reflect differences in economic factors between a state-controlled-economy country and a non-state-controlled-economy country. *See* 43 Fed. Reg. 1356 (January 9, 1978).

[34] Brief of Zenith Radio Corporation before the Court of Customs and Patent Appeals 13.

[35] *Id.* at 10, 430 F.2d at 245.

[36] Brief of the United States Before the Court of Customs and Patent Appeals 44-45; 562 F.2d at 1215.

have changed enormously since the early twentieth century. In *Downs* the remission of the indirect tax was on a single product — sugar — and was intimately related to Russia's whole regulatory scheme for that commodity. In *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919), another early case cited by Zenith, the tax and remission again applied only to a single product—spirits—and were again part of an overall regulatory scheme.

Today, on the other hand, most European countries impose indirect taxes on virtually all products sold domestically and forgive these taxes on all exports.[37] These taxes and remissions do not appear to be part of a scheme of regulation that masks an intent to promote exports of a particular product or group of products. On the contrary, the governments of such nations as the United Kingdom, France and the Federal Republic of Germany rely on indirect tax systems (the so-called value-added tax, or "VAT") for large proportions of their revenues.[38] These VAT's are, in effect, partial substitutes for the income tax, which provides a relatively higher proportion of the cost of the government in the United States.[39] The character and economic effects of these taxes are vastly different from those of Russia's turn-of-the-century tax on sugar consumed domestically and tax remissions for sugar exports.

[37] *See generally* Organisation for Economic Cooperation and Development, Border Tax Adjustments and Tax Structures in OECD Member Countries (1968).

[38] In 1975, for example, VAT's accounted for the following percentages of central government tax revenues: West Germany—14.7%; France—23.3%; Belgium—15.7%. Organisation for Economic Cooperation and Development, Revenue Statistics of OECD Member Countries, 1965-1975 (1977). These figures compare with the less than 5% of central government revenue raised by the Japanese Commodity Tax. *Id.* at 148-49.

[39] Marks & Malmgren, *supra,* note 7, at 353. OECD, Border Tax Adjustments note 37 *supra* at 260-61.

* * *

If Section 303 is to remain a safeguard against unfair trade practices, its interpretation must be responsive to developments in international trade and national regulation. At the same time, care must be taken to ensure that the law to combat unfair trade practices is not itself administered unfairly as would be the case if practices which have no effect on exports are treated as "bounties or grants," unnecessarily subjecting foreign exports to countervailing duties in the U.S. These objectives can best be achieved if, in administering the Statute, careful examination is made of the individual foreign tax programs at issue.

II. If This Court Enters Judgment For Zenith, It Should Do So On The Basis Of The Facts Peculiar To The Japanese Tax Involved In This Case.

If this Court reverses the Court of Customs and Patent Appeals and holds that the Japanese Commodity Tax Law is a "bounty or grant" within the meaning of Section 303, it should base its decision on the selective nature of the Japanese scheme and its concomitant distortion of normal trade and production patterns, as described in part I.B.3. above. The decision should not implicate general and uniform indirect taxes and border remissons such as the value-added taxes of many European nations and the Manufacturer Sales Tax of Canada. That is, this Court should not adopt a "*per se*" rule that would apply to all tax remissions on export, but should allow the Department of the Treasury to distinguish—if the facts warrant—other indirect taxes and border rebates from the Japanese scheme. In short, a finding for Zenith should not compel a later determination

that rebate of European value-added taxes or Canadian federal sales taxes are also "bounties or grants."

A. *The Japanese Commodity Tax Law Is A Selective Indirect Tax That Confers A Competitive Advantage On Exports.*

Although there is no evidence that the operation and effects of the Japanese Commodity Tax have been fully explored by the Treasury Department and the lower courts, it is clear that the tax is applied only to a limited number of products, which constitute less than eight percent of domestic consumption.[40] As such, the tax raises domestic consumer prices of the items to which it applies while decreasing the return to the manufacturer, and thereby provides an incentive to increase export sales of these items. The taxes collected on these products annually amount to less than five percent of Japan's total revenue.[41] The Japanese commodity tax is clearly not one of general applicability, and changes in exchange rates and wage rates can only partially neutralize the incentive to export the specific products to which the tax and rebate program applies. Nor does the Japanese Commodity Tax Law raise a major portion of the government's revenue, as is the case with the European value-added taxes.

The function of the Japanese Commodity Tax Law in stimulating exports while suppressing domestic demand is underscored by the fact that the selected products covered by the law include Japan's major consumer exports to the United States. In addition to the consumer electronic products which occasioned Zenith's complaint (including radios, televisions, tape recorders and stereo equipment),

---

[40] See Appendix A for a list of these product groups.

[41] *See* note 38 *supra*.

the list includes passenger cars. These two categories of products alone account for more than half of all consumer exports from Japan to the United States.[42] Other significant consumer exports also appear on the list, such as motorcycles, snowmobiles, cameras, air conditioners and furniture.

By selecting these products for its commodity tax and export rebate program, Japan effectively creates an economic incentive for its manufacturers to export their products rather than sell them in the home market. The tax raises the price to the consumer in Japan on television sets, radios, passenger cars, and the other items taxed relative to the majority of products, which are not subject to the tax. Domestic demand for these products is accordingly lower than it would be absent the tax. On exports, however, the tax is rebated at the border, and the Japanese manufacturers experience no suppression of demand or price in its export markets. Thus manufacturers have an incentive to divert their supply of these items to the more profitable export markets, of which the United States is one prominent example.

B. *A Narrow Holding Is Necessary if the Purpose of the Countervailing Duty Statute Is To Be Respected.*

As explained earlier, the complexities of international trade and the variance among national tax practices requires close examination of the effects of any export rebate of indirect taxes before it is determined to be a bounty or grant. Only through such an examination can the broad language of the countervailing duty statute rationally be applied in practice.

---

[42] U.S. Department of Commerce, United States Trade with Major Trading Partners 1969-75 (1976), at 29-32.

As discussed previously, the general and uniform value-added tax, as used by some European countries and Canada, brings forth an adjustment of exchange rates and wages, which neutralize any export incentive the tax programs might create. No trade distortion occurs. *Prima facie* it would be a perversion of Section 303 to apply countervailing duties to the products of countries with such generalized indirect tax systems.

C. *A Narrow Holding Is Further Compelled By The Unique Circumstances Of Long-Standing Reliance On Established Administrative Practice.*

Because the Treasury Department has consistently refused to make an affirmative determination in any case of a "non-excessive" indirect tax remission, and because such refusals have been subject to judicial review only since 1975, great reliance on the Treasury Department position developed among businesses in the United States and abroad, and among the governments of major trading nations. Some of these foreign governments, such as the European nations, have made major structural changes in their tax systems on the assumption that the U.S. Government would not consider rebates of indirect taxes to be bounties or grants under U.S. law. It is certain that if these governments had any reason to believe otherwise, they would have negotiated these issues with the United States prior to effecting internal tax reform.

This case, then, presents a unique situation in which an administrative practice has developed over three-quarters of a century without opportunity for judicial oversight and modification. In these circumstances, a broad holding by this Court that potentially places a new and unexpected burden on exports from the European

Community and certain other nations should clearly be avoided, especially since the very different tax programs of those countries are not involved in the case before the Court. Such a holding would immediately strain U.S. economic relations not only with the European nations, but also with Canada, which also has a widespread excise tax and border rebate system.[43]

III. If This Court Affirms The Decision Of The Court Of Customs And Patent Appeals, Its Decision Should Not Preclude Later Determinations That Rebates Of Specific Indirect Taxes Are Bounties Or Grants.

If this Court affirms the court below and holds that the Japanese Commodity Tax Law does not constitute a "bounty or grant" within the meaning of Section 303, its decision should rest on the absence of proof at this time that the Japanese scheme provides an incentive to export to the U.S. marketplace. The Court should make clear that it is not establishing a fixed rule of law that such border rebates of indirect taxes can *never* be bounties or grants under the statute.

In so framing its decision, this Court will leave with the Secretary of the Treasury his statutory authority to determine that rebates of specific taxes do constitute bounties or grants within the meaning of Section 303. Thus, the Department of the Treasury will continue to perform the role assigned to it by law. The Secretary should, however, be required to rest these determinations on a careful examination of the operation and effect of the rebate schemes in question and to provide reasons for his

[43] *See* Organisation for Economic Cooperation and Development, Border Tax Adjustments and Tax Structures in OECD Member Countries 116-118 (1968).

determinations. The application of the statute can thus be adapted to economic realities by the Secretary's exercise of discretion on a continuing basis, and meaningful judicial review of this discretion will be possible.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to remand the case for consideration of the operation and effects of the Japanese Commodity Tax Law. If the Court does not remand, Amicus urges action consistent with the other alternatives suggested.

Respectfully submitted,

ROBERT E. HERZSTEIN
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae

Of Counsel:

H. R. NOLTE, JR.
Vice-President—General Counsel
M.S. EVELEV
Ford Motor Company
Dearborn, Michigan 48121

ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

APPENDIX A

Typical Products Taxed and Applicable Rates

Class I: Luxuries taxed at the retail level

10% Rate: Carpets, rugs, and other furnishings of textiles

15% Rate: Articles (other than clocks and watches) of, combined with, trimmed in, plated with precious stones, pearls, gold, platinum, coral, amber, elephant tusks, and furskins

Class II: Consumer goods taxed at the manufacturer level

5% Rate:
- Microphones
- Motorbikes
- Passenger cars (engines under 550 cc)
- Beverages—coffee, tea, cocoa, fruit juices, soft drinks
- Toilet preparations

10% Rate:
- Snowmobiles
- Waterskis and water sports equipment
- Motorboats, yachts, rubber boats, motors (small size)
- Perfumery and manicure

~~15% Rate~~:
- Radios, sound recorders, clocks made from non-precious materials

15% Rate:
- Passenger cars (engines over 550 cc up to 2,000 cc)
- Certain consumer electronic products—radios (stereo type), television sets, stereo equipment, TV picture tubes
- Electric blankets
- Stoves, ranges, ovens, radiators
- Refrigerators with capacity less than .17 cubic meters
- Dish washers, washing machines
- Fans, vacuum cleaners, food mixers
- Photographic equipment and supplies—cameras, projectors, film, flashbulbs

BEST COPY AVAILABLE

Car air conditioners scrolls
Motorboats, yachts, ~~shells~~ (medium size)

20% Rate: Passenger cars (engines over 2,000 cc)
Lighting equipment—chandeliers and desk lamps
Refrigerators with capacity greater than .17 cubic meters
Room air conditioners
Furniture
Bags and trunks
Smokers articles
Pinball machines, bowling goods

30% Rate: Golf equipment—clubs, balls, bags
Camping trailers; campers
Hunting firearms
Billiard equipment
Motorboats (longer than 8 m.)
Yachts (longer than 9 m.)

Sources: Tax Bureau, Ministry of Finance (Japan), An Outline of Japanese Taxes
T. Hayashi, Guide to Japanese Taxes (1977)